Supreme Court, U.S.
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No. 91-2050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPEL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C. AND M.J. "IKE" VANDEN EYKEL

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ABBREVIATION AND RECORD REFERENCES

Abbreviations

In this Brief, the following terms in quotation marks shall have the meaning as referenced:

"Respondents" refers to Seeligson, Douglass, Falconer & Vanden Eykel, P.C. and M.J. "Ike" Vanden Eykel, unless the context requires otherwise.

The "Besings" refers to Petitioners, Ray G. Besing and Ray G. Besing & Associates, P.C.

The "Plan" refers to the Besings Amended Joint Plan of Reorganization confirmed June 28, 1989.

For ease of reference the Bankruptcy Code will be referred to herein by section number and/or referred to as "the Code".

Record References

In this Brief, "Tr." references to the page number of the original record where the references matter may be found. Citations to the Record are to the original record pagination or listed in the bottom-right corner of the document.

"R. Exc." refers to the tab number of the Record Excerpts served by the Besings with their Brief to the United States Court of Appeals for the Fifth Circuit.

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SEELIGSON, DOUGLASS, FALCONER
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REPLY STATEMENT OF THE CASE

Failure to State Reasons for Grant of Writ

Petitioners' Statement of the Case fails to state any special or important reasons for this Honorable Court to grant the requested Writ of Certiorari.[1] Petitioner has

[1] Rule 10.1 of the Rules of the Supreme Court of the United States.

failed to show that the decision of the Fifth Circuit is in conflict with the decision of another United States Court of Appeals on the same matter, or that the Fifth Circuit has decided a federal question in any way in conflict with a state court of last resort; or that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.[2] Petitioners have also failed to show that the decision of the Fifth Circuit decided an important question of federal law which has not been, but should be, settled by this Court, or that the Fifth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.[3] The Petitioners have failed to show these or any other special or important reasons why the requested writ should be granted.

Course of Proceedings Below

The course of proceedings below is adequately presented in the Besings' Petition, except as follows: (1) this appeal does not require a determination of the correct construction of §108(a) of the Code; and (2) the Bankruptcy Court did not decline to hear the case, but rather heard the case and granted summary judgment in favor of Respondents on the grounds of collateral estoppel.

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[2] Rule 10.1(a) of the Rules of the Supreme Court of the United States.

[3] Rule 10.1(c) of the Rules of the Supreme Court of the United States.

Statement of Facts

Respondents deny the Besings' assertion, as fact, that Respondents' conduct was negligent and caused the striking of Besings' pleadings or the granting of a default judgment and summary judgment on Noble's counterclaim.

The Court should consider the following facts in addition to the facts presented in the Besings' Brief:

1. The Besings' Confirmed Joint Plan of Reorganization reserved to the bankruptcy estate only certain liens in Mr. Besing's homestead, an Austin condo, an automobile, and some IBM equipment. The Plan did not reserve the claim against Respondents.

2. The two Petitioners and the remaining Respondents in this cause of action are identical parties to those in a collateral action filed and decided in a Texas District Court of Dallas County, 68th Judicial District.

3. Petitioners have admitted in the State Court that Respondents' statute of limitations defense "turns on whether 11 U.S.C. §108, which operates to extend the period of limitations, is available to Plaintiffs as debtors in possession on September 19, 1989."

4. Petitioners' state court cause of action against Respondents has been dismissed with prejudice by the trial court and is a final judgment, pending the Petitioners' right to appeal.

REPLY STATEMENT OF THE ISSUES PRESENTED

REPLY ISSUE NO. 1:

AFTER CONFIRMATION OF THEIR CHAPTER 11 BANKRUPTCY PLAN OF REORGANIZATION, THE BESINGS BROUGHT SUIT IN STATE COURT AGAINST RESPONDENTS. AFTER AN ADVERSE DECISION BASED ON LIMITATIONS, THE BESINGS BROUGHT SUIT IN THE BANKRUPTCY COURT FOR A DETERMINATION OF THE SAME ISSUE AGAINST THE IDENTICAL PARTIES. DID THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY AFFIRM THE BANKRUPTCY COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

REPLY ISSUE NO. 2:

WAS THE TOLLING PROVISION OF 11 U.S.C. §108(a) AVAILABLE TO PETITIONERS AT THE TIME THE STATE COURT SUIT WAS FILED? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 2).

SUMMARY OF THE ARGUMENT

The Petitioners filed suit in state court against the Respondents. The Respondents filed a motion for summary judgment on the basis of limitations, and the state court granted it. The Petitioners appealed the state court summary judgment to a Texas court of appeals, and filed a declatory judgment suit in the Bankruptcy Court for a re-determination of the same limitations issue against the identical defendants. The Bankruptcy Court granted the Respondents' motion for summary judgment on the grounds of collateral estoppel based upon the state court decision, which the District Court and Court of Appeals affirmed.

A judgment is final for collateral estoppel purposes even if an appeal is pending, unless the appeal is a trial

de novo. An appeal of a summary judgment is not a trial de novo because the appellate court is limited to the record before it and does not "try the case as if the suit had been filed originally in that court." Accordingly, the Bankruptcy Court properly granted summary judgment based upon collateral estoppel, and the District Court and Court of Appeals properly affirmed.

Even if collateral estoppel did not apply, the Petitioners are clearly not entitled to the benefits of 11 U.S.C. §108. Section 108's tolling provision applies only to claims brought by trustees and debtors-in-possession. A mere debtor is not entitled to the benefits of §108 on a claim that reverts to him upon confirmation of his reorganization plan. The claims against Respondents were not explicitly reserved for the estate in the Petitioners' Plan. Therefore, pursuant to 11 U.S.C. §1141(b) of the Code, such claims vested in the Besings upon confirmation. Accordingly, §108 does not apply and the limitations period for the Petitioners' claim expired.

ARGUMENT AND AUTHORITIES

I.

AFTER CONFIRMATION OF THEIR CHAPTER 11 BANKRUPTCY PLAN OF REORGANIZATION, THE BESINGS BROUGHT SUIT IN STATE COURT AGAINST RESPONDENTS. AFTER AN ADVERSE DECISION BASED ON LIMITATIONS, THE BESINGS BROUGHT SUIT IN THE BANKRUPTCY COURT FOR A DETERMINATION OF THE SAME ISSUE AGAINST THE IDENTICAL PARTIES. DID THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY AFFIRM THE BANKRUPTCY COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

The Bankruptcy Court, the District Court, and the Court of Appeals properly determined that Respondents were entitled to summary judgment as a matter of law because the competent summary judgment evidence demonstrated that the Petitioners are collaterally estopped from re-litigating identical issues that they have already litigated and lost in another court of competent jurisdiction.

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). When the movant complies with Rule 56(c), summary judgment shall be granted. *Crocker Nat'l Bank v. Ideco Div. of Dresser Industries, Inc.*, 839 F.2d 1104, 1106 (5th Cir. 1988). The Court of Appeals should review the summary judgment record under the same standard as the lower court applied to determine that summary judgment was appropriate. *Bache v. AT&T*, 840 F.2d

283, 287 (5th Cir. 1988). In the present case, the Besings, as well as the Respondents, filed a motion for summary judgment (Tr. 361-73) and have raised no fact issues preventing summary judgment on the legal issues before the Court. (Tr. 467-72.) Accordingly, there is no genuine issue as to any material fact in the case at bar. By affirming the decisions of the Courts below, the Fifth Circuit Court of Appeals followed established precedent.

The Respondents' motion for summary judgment was granted in the Bankruptcy Court on the basis that a Texas state court, with the identical parties before it, had already decided the relevant issues. Pursuant to 28 U.S.C. §1738, a state court judgment is entitled to the same preclusive effect as it is given by the courts of that state. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986); *Migra v. Warner City School Dist.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Rives v. Franklin Life Ins. Co.*, 792 F.2d 1324, 1328-29 (5th Cir. 1986).

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court held that a final judgment, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstances where the appeal is really a trial de novo. The Court's rationale was that, where identical parties and issues are involved, re-litigating an issue poses much greater danger that dismissing an action that may still be determined in the collateral cause. The Court stated, "Despite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse." *Id.* at 6, *quoting* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4433 at 313 (1981).

The *Scurlock* court also emphasized the waste of the already overburdened judiciary's time caused by a retrial of identical issues between identical parties. 724 S.W.2d at 6.

Scurlock has routinely been applied in Texas since it was rendered. *See, e.g., Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299 (Tex. 1988); *American General Fire and Casualty Co. v. Schattman*, 761 S.W.2d 582 (Tex. App. – Forth Worth 1988, no writ); *CLS Associates v. A.B.*, 762 S.W.2d 221 (Tex. App. – Dallas 1988, no writ) (applying *Scurlock* to bar prosecution of a legal malpractice claim where the underlying issues of services performed had already been adjudicated in a suit for attorneys fees).

The case at bar presents a classic example of collateral estoppel. The Texas court rendered summary judgment based upon the identical issue that the Besings sought to present to the Bankruptcy Court: the availability of the tolling provision of §108(a) of the Code to the Besings to extend the statute of limitations. Having litigated the identical issue between identical parties, the state court judgment, even though on appeal, collaterally estops the Bankruptcy Court from deciding the issue anew.

In the Court of Appeals, the Besings raised for the first time the claim that the elements of collateral estoppel are not met because the state court appeal is, in effect, a trial de novo. This argument was not raised or presented to either the Bankruptcy Court or the District Court and it is improper to raise it for the first time on appeal. *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978) (per curiam).

Even if this Court were to consider the Besings' de novo argument, that argument must fail. The Besings

cite no authority for the naked assertion that the state court appeal is a trial de novo. (See Petition for Writ of Certiorari at 6.) The lack of authority is not surprising since it is clear that a review of a summary judgment by a Texas court of appeals is not a trial de novo:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 1B C.J., 486; 24 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case *as if the suit had been filed originally in that court. Zurich General, etc. Co. v. Rodgers,* 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a *full civil trial on the facts as well as the law.*

Lone Star Gas Co. v. State, 153 S.W.2d 681, 692 (Tex. 1941) (emphasis added).

A review of a summary judgment is not a trial de novo under Texas law because a Texas court of appeals is restricted to considering only the evidence and issues raised by the parties in the trial court. *Medina v. El Paso Machine & Steel Works, Inc.,* 740 S.W.2d 99 (Tex. App. – El Paso 1987, no writ). *See also* Tex. R. Civ. P. 166a. (See Add. at 6.) In the trial court the parties may present whatever arguments and evidence they wish and can supplement with leave of court. Tex. R. Civ. P. 166a(f) & (g). On appeal, the parties can supplement neither their argument nor proof and are restricted to the matters raised in the court below. The court of appeals does not "try the case as if the suit had been filed originally in that court" and the appeal is therefore not a de novo trial. In general terms, an appeal from a normal trial court judgment is not considered a trial de novo. *CLS Associates v. A.B.,* 762 S.W.2d at 223.

Moreover, the federal standard for application of collateral estoppel is identical to the Texas standard. *E.g.*, *Prager v. El Paso Nat'l. Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). In determining whether an appeal constitutes a trial de novo, Professor Moore offers the following guidelines:

> If the appellate court is limited to consideration of the trial record and to affirming, reversing, vacating or modifying the judgment under review, the judgment . . . is entitled to collateral estoppel effect, until it is reversed, vacated or modified.

1B J. Moore, *Moore's Federal Practice* ¶ 0.416[3] at 522-23 (2d ed. 1991). Because a federal appeals court like a Texas court of appeals is limited to the summary judgment record and may only affirm, reverse, vacate, or modify the judgment below, a federal summary judgment that is on appeal is also entitled to preclusive effect.

The Besings cite the case of *Citibank N.A. v. Graphic Scanning Corp.*, 618 F.2d 222 (2d Cir. 1980), as analogous to the case at bar. *Citibank N.A. v. Graphic Scanning Corp.* is distinguishable on at least two grounds: first, it is decided under the law of New York, not Texas, and there is no showing that the two state standards for collateral estoppel are similar; and second, the court is construing the Communications Act, not the Bankruptcy Code. The Communications Act vests exclusive jurisdiction of the claim brought by Citibank in the federal courts or before the Federal Communications Commission. In the case at bar there is no exclusive jurisdiction of this matter in the Bankruptcy Court, as the District Court correctly noted in its opinion affirming the Bankruptcy Court.

This Court has said that state courts routinely, and properly, interpret the Bankruptcy Code and that their

decisions on those issues should be given preclusive effect under the doctrine of collateral estoppel. *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). *See also Nix v. Zervas*, 92 B.R. 164 (Bankr. N.D. Tex. 1988). In *Brown v. Felsen*, this Court held:

> If, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of §17 [of the Bankruptcy Act], then collateral estoppel, in the absence of countervailing public policy, would bar re-litigation of those issues in the bankruptcy court.

442 U.S. at 139 n.10.

This reasoning is squarely in line with the facts in the case at bar. The state court had the identical parties before it, and decided the identical issue – Was 11 U.S.C. §108(a) available to the Besings to toll the applicable statute of limitations? Collateral estoppel bars re-litigation of that issue in the Bankruptcy Court and the Bankruptcy Court was correct in granting Appellees' motion for summary judgment based on collateral estoppel.

II.

WAS THE TOLLING PROVISION OF 11 U.S.C. §108(a) AVAILABLE TO PETITIONERS AT THE TIME THE STATE COURT SUIT WAS FILED? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 2).

The Besings attempt to convince this Court that a Writ of Certiorari should be granted because they are entitled to the limitations extension of §108(a) of the Code as a matter of law. Respondents object to the inclusion of this argument as grounds for the writ since this issue was not reached or considered by either the Bankruptcy Court, the District Court, or the Court of Appeals. The decisions of the courts below were based

upon collateral estoppel. Nonetheless, subject to the foregoing objection, Respondents will address the Besings' argument concerning this section of the Code to demonstrate that no basis exists for granting the writ.

The Besings' argument regarding §108(a), while inventive, lacks merit. The §108(a) issue was instead correctly decided in the forum originally chosen by the Besings, the Texas state court. As a matter of law, the Besings were not entitled to the benefits of §108(a) on their claim for relief because (1) they were not debtors-in-possession when they brought suit and (2) this claim was not reserved in thier Plan of Reorganization.

Under §1141(b) of the Code, all property of a bankruptcy estate revests in the debtor on *the date of confirmation.* The bankruptcy courts have consistently held that confirmation of a plan of reorganization terminates debtor-in-possession status. *See In re Grinstead,* 75 B.R. 2 (D. Minn. 1985); *U.S. v. Redmond,* 36 B.R. 932 (Bankr. D. Kan. 1984). The tolling provisions of the Code have no application to a debtor post-confirmation, but are provided only to toll limitations in actions by a trustee (or debtor-in-possession) for the benefit of the estate. *In re Lawler,* 106 B.R. 943, 961 (Bankr. N.D. Texas 1989).

In *Redmond,* the court expressly rejected the proposition advanced by the Besings in this case: that the debtors continued to be debtors-in-possession because the estate was being administered and was not closed. The *Redmond* court held:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors . . . .

> It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new eneity, and administration of the estate ceases.

36 B.R. at 934.

In *Grinstead,* the court held that the debtors lost their debtor-in-possession status on the date that their Plan of Reorganization was confirmed, stating:

> The term "debtor in possession" is intended to refer to a debtor who *during thependency of a case prior to confirmation* retains property in the fiduciary of a trustee of the estate.
>
> Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan specifically provides otherwise, and all estate property revests in the debtor subject to the terms and conditions imposed by the plan . . . . *There is no debtor-in-possession status of a debtor post confirmation.*

75 B.R. at 3 (emphasis added).

The Fifth Circuit Court of Appeals opinion in *Cunningham v. Healthco, Inc.,* 824 F.2d 1448 (5th Cir. 1987), squarely addresses the standing of a post-confirmation debtor/debtor-in-possession to assert the benefit of §108(a). In *Cunningham,* the Court held:

> While a debtor-in-possession is entitled to §108's tolling period, however, *a debtor is not* . . . Thus, the statute of limitations issue is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on §108's tolling of the limitations period . . . . On the other hand, if the reorganization period had ended and Dental

> Leasing had returned to "debtor" status, then §108's protection would not have been available to it . . . .

Id. at 1460 (emphasis added).

The Court then found that a post-confirmation debtor could obtain the benefits of §108 only if the plan of reorganization explicitly reserved any recovery of damages for the creditors. The *Cunningham* Court expressly found that the plan in that case contained the necessary reservation. Because of that explicit reservation for the benefit of creditors, the *Cunningham* Court held that the debtor was still entitled to assert the tolling provisions of §108(a) post-confirmation. *Id.* at 1460. While the debtor/debtor–in-possession distinction was clearly recognized in *Cunningham*, the determining factor was the reservation of the potential claim for the creditors in the plan.

The Besings' Plan, on the other hand, did not reserve the claim in the case at bar. Under Section 4.1, the Plan vests the Besings with all of the property in the Besing estates on the Effective Date of the Plan, except the liens described in Paragraph 3.4, 3.4.1, and 3.5.1. The liens described in paragraphs 3.4, 3.4.1, and 3.5.1 did not reserve the alleged causes of action against the Respondents, but related to interests in Mr. Besing's homestead, his Austin condominium, an automobile and some IBM equipment. The claims against the Respondents were not reserved for the Estate or the creditors, but vested in the Besings. Therefore, the Besings lost the status of debtor-in-possession and application of the §108 tolling provision. As a result, the Besings' claims against the Respondents are time-barred.

Other courts have agreed that the tolling provisions of §108 are not available to debtors. *Motor Carrier Audit &*

Collection Co. v. Lighting Products, Inc., 113 B.R. 424 (N.D. Ill. 1989); *Craig v. Barclays American Financial, Inc. (In re Craig)*, 7 B.R. 864 (Bankr. E.D. Tenn. 1980). In *United Bank of Loves Park v. Dohm (In re Dohm)*, 14 B.R. 701 (Bankr. N.D. Ill. 1981), the court rejected the contention that §108 would permit the debtors an extension of the redemption period under Illinois foreclosure law.:

> The Court has never been called upon previously to construe Section 108, but even if Section 108 were intended as authority for tolling a redemption period, it does not appear that it is available to debtors, but only to trustees. Surely, conflicts between trustees and debtors would arise if Section 108 were available to both.

Id. at 702. In any event, *Cunningham* is controlling on this issue and there is no reason for this Court to re-examine its well reasoned holding. *Cunningham* is not in conflict with the decisions of any other court.

The Besings argue that the Respondents' position is based on two erroneous premises: (1) that confirmation of the Besings' Plan terminated the bankruptcy estate and the administration thereof; and (2) that, because §1141(b) of the Code provides that confirmation of a plan operates to vest all property of the estate in the debtor free and clear of the claims of creditors, any recoveries from the suit filed after confirmation will benefit only the Besings, not the creditors. The Besings' argument misstates Respondents' position. Respondents have never asserted, nor do they believe, that the Bankruptcy Court does not still maintain jurisdiction over certain matters pertaining to the Besings' bankruptcy cases. The contention of the Respondents, based upon §541(a) of the Code (See Add. at 2) and by the cases

that have considered it, is that the Besings' claims against Respondents were the property of the bankruptcy estate prior to confirmation of the Plan. Upon confirmation, pursuant to §1141(a) the claims revested in the Besings because it was not explicitly retained by the bankruptcy estate in the Plan. Reservation of the claims in the Plan was the only method to preserve the benefits of §108(a).

Respondents have never taken the position that any recovery by the Besings would not benefit the creditors of the estate; rather, the position has been that the Plan itself must have reserved the claim for anyone to realize the benefits of §108(a). The Besings' glaring misstatement of Respondents' position can only be an attempt to obscure the flawed nature of the Besings' position.

The Besings further attempt to confuse the issue by stating that Respondents argue that actions of the nature brought by the Besings in the state court must be brought before confirmation. Respondents have taken no such position. Clearly this action could have been brought post-confirmation if the Besings had done what was necessary to preserve the claim: reserve it in the Plan. The Besings have made their own bed; they just do not want to lie in it.

Just as misplaced as their reasoning is the Besings' reliance on the cases cited to support their argument that they are entitled to the benefits of §108(a). Asserting that there is no distinction between a debtor and debtor-in-possession, the Besings rely upon the cases of *Seawinds Ltd. v. Nedlloyd Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987); *Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280 (5th Cir. 1983); *Flying "S" Land & Cattle Co. v. Beaumont (In re Flying "S" Land & Cattle Co. Inc.)*, 71 B.R. 183 (Bankr. D. Nev. 1987); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr.

N.D. Tex. 1986); and *In re Hargis*, 73 B.R. 622 (Bankr. N.D. Tex. 1987). None of these cases addresses the issue presented in the case at bar and squarely addressed and answered by *Cunningham*: after the date of confirmation of the plan of reorganization and where the plan does not reserve the claim to the estate, §108 is not available to a mere debtor.

It is also important to note that all of the cases relied upon by the Besings in their Brief were decided prior to *Cunningham*, including *Seawinds*, *Triangle Chemicals*, *Flying "S" Land & Cattle Co., Inc.*, *Chapel Gate*, and *Hargis*. Each of these cases is further distinguishable as set forth below.

In *Seawinds*, the distinction between the debtor-in-possession and the debtor is not an issue. Rather, the case involves unfair competition claims and the application of the Shipping Act of 1984. Specifically, the issue addressed by the *Seawinds* court was the applicability of §108(a) to the savings provision of the Shipping Act. In no way, shape or form was the debtor/debtor-in-possession distinction relevant to the court's decision. Ultimately, the *Seawinds* court decided that §108 did not apply and used the savings provision of the Shipping Act to hold that the suit was not timely. Since §108(a) was not a part of the *Seawinds* Court's decision, any interpretation of §108 is dictum and not binding on any court.

The issue addressed in *Flying "S" Land & Cattle Co.* was whether or not debtors-in-possession are entitled to the benefits of §108. That case decides, quite correctly, that a debtor-in-possession is entitled to the benefits of §108. However, the court does not address whether or not a post confirmation debtor is entitled to the privileges of §108. In fact, the court expressly recognizes

the debtor/debtor-in-possession distinction and accepts the proposition that §108 does not benefit debtors:

> The *Dickson, Craig,* and *Dohm* cases cited by Beaumont are not in point. These cases support the proposition that *debtors* are not entitled to the benefit of §108(a). Beaumont's reliance on these cases is misplaced because none of the cases cited involved *debtors in possession* as defined in 11 U.S.C. §1101(1), and having the rights, powers and duties prescribed in 11 U.S.C. §1107(a).

Flying "S" Land & Cattle Co., 71 B.R. at 185 (emphasis in original).

The cases of *Triangle Chemicals, Inc., Chapel Gate,* and *Hargis* are easily distinguishable from the case at bar in that the issue in each case was the procedure for an allowance of attorney's fees in bankruptcy cases. None of these cases addressed the application of §108 to post-confirmation debtors and all involved completely different policy considerations.

In support of their position that confirmation of the Plan of reorganization does not terminate the bankruptcy estate or its administration, the Besings rely on *Lombard-Wall, Inc. v. New York City Housing Development Corp. (In re Lombard-Wall, Inc.),* 44 B.R. 928 (Bankr. S.D.N.Y. 1984). While, as set forth above, Respondents have never taken the position that confirmation terminates the bankruptcy estate or its administration, *Lombard-Wall* is instructive because the plan of reorganization in that case specifically provided that the bankruptcy court would retain jurisdiction over any disputes which might arise in connection with the claims asserted by the Debtors therein. This is entirely consistent with the *Cunningham* rationale that the post-confirmation debtor loses the benefit of §108(a) unless the claim is specifically reserved in the plan of reorganization.

The Besings also place great reliance on the case of *Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.)*, 64 B.R. 721 (Bankr. M.D. Tenn. 1986). Their reliance is misplaced. The Besings contend that *Tennessee Wheel* holds that the absence of a reservation of the claim in the plan is not fatal and then go on to allege that the plan in *Tennessee Wheel* did not reserve the claims to the jurisdiction of the bankruptcy court. Nothing could be further from the truth. In fact, the plan in *Tennessee Wheel* specifically reserved the claims set forth in *Tennessee Wheel*. The opinion states:

> The Plan called for retention of jurisdiction by the bankruptcy court, *inter alia*, to recover assets pursuant to 11 U.S.C. §§547 and 548 . . . .
>
> These adversary proceedings are the avoidance actions described in the disclosure statement and plan and preserved for the debtor by the plan and confirmation order.

Id. at 723-24.

The issues that are addressed in *Tennessee Wheel* are §547 preferences, and whether the debtor can maintain a preference action after confirmation. The Defendants in *Tennessee Wheel* asserted that the avoidance actions passed out of the estate pursuant to the provisions of the confirmed plan. The Court rejected the Defendant's contention, finding:

> This ground is baseless because the reorganized debtor is statutory successor in interest to the pre-confirmation debtor *and the plan of reorganization clearly contemplated retention of jurisdiction* by the bankruptcy court to complete the prosecution of these avoidance actions.

Id. at 727 (emphasis added).

Even though *Tennessee Wheel* can be distinguished on the grounds that it was decided pre-*Cunningham* and was based upon a preference action, the logic of *Tennessee Wheel* is entirely consistent with *Cunningham* and the position of the Appellees herein. If a claim is reserved in the plan of reorganization, then it can be asserted post-confirmation by the debtor and enjoy the benefits of the rights granted to debtors-in-possession. The Besings in this case simply did not do what *Tennessee Wheel* and *Cunningham* say they must do: reserve the claim in the Plan.

The remaining cases cited in the Besings' Petition are: *J.E. Jennings, Inc. v. Williams Carter Co. (In re J.E. Jennings, Inc.)*, 46 B.R. 167 (Bankr. E.D. Penn. 1985); and *Korvettes, Inc. v. Sanyo Electric, Inc. (In re Korvettes, Inc.)*, 42 B.R. 212 (Bankr. S.D.N.Y. 1984). Each of these cases is distinguishable from the case at bar in that all the cases involve claims of preferences of one type or another. However, each case is significant in that in each case the plan of reorganization specifically retained the jurisdiction of the bankruptcy court to determine the adversary proceedings at issue. For example, in *Jennings*, the Court found that:

> Reference to the plan and order confirming the plan in this case *indicate that the debtors* intended and *expressly provided for retention of jurisdiction* by the bankruptcy court over actions pending at the time of confirmation and actions commenced after the time of confirmation, and over any assets recovered as a result of these actions.

46 B.R. at 170 (emphasis added).

Jennings also confirms the legal position of Respondents in this case that all assets of the estate revest in the

debtor upon confirmation of a plan "if the plan does not contain language indicating otherwise". 46 B.R. at 170.

The Besings rely upon *Korvettes* for the proposition that the debtor may bring actions until two years after the filing of the bankruptcy petition. In the first instance the *Korvettes* decision is confined to preference actions. More significantly, that court held that:

> [A] debtor in possession should be able to bring preference actions until a reorganization case is confirmed, no matter how long that process naturally takes. If, however, a case is confirmed in less than two years, the debtor may bring these actions until the two-year period has elapsed, *so long as it has provided in the confirmation documents* that preference actions may be brought post confirmation.

Korvettes, 42 B.R. at 222-223 (emphasis added). Even the *Korvettes* Court therefore would not extend the statute of limitations unless the claim was expressly reserved in the plan of reorganization.

Interestingly, one case not cited or relied upon by the Besings in the Court of Appeals, or in their Petition to this Court, but cited in their brief to the District Court is the case of *Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (In re Neptune World Wide Moving, Inc.)*, 111 B.R. 457 (Bankr. S.D.N.Y. 1990). The Besings relied upon *Neptune* in the District Court in support of their proposition that "§1141(b) authorized the debtor to proceed with recovery actions post confirmation, when the plan retains the court's jurisdiction . . . . over actions pending at the time of confirmation and actions commenced after the time of confirmation . . . ." It is amazing that the Besings relied upon *Neptune* and instructive that they omitted it from the Brief to the

Court of Appeals and in their Petition to this Court. The issue before the Court in *Neptune* was the bankruptcy court's post-confirmation jurisdiction over the debtor's claim. The Court held that it had *no jurisdiction* over Neptune's claim because "the property of the estate has reverted to Neptune pursuant to 11 U.S.C. §1141(b), whereas the terms of its plan and confirmation order *do not provide* for retained jurisdiction to sustain post confirmation adversary proceedings". *Id.* at 464 (emphasis added).

Respondents suggest that the Court of Appeals properly followed the guidance of *Neptune*, as well as *Cunningham* and its progeny, and properly held that where a debtor fails to retain or reserve a claim in its plan of reorganization that said claim reverts to the property of the debtor and that the post confirmation debtor is not entitled to the benefits of §108(a).

CONCLUSION

The Bankruptcy Court propertly granted Respondents' Motion for Summary Judgment on the basis of collateral estoppel and the District Court and Court of Appeals properly affirmed the judgment of the Bankruptcy Court. The identical issues presented by the Besings to the Bankruptcy Court had been presented to a completent court of collateral jurisdiction. The identical parties were involved and the collateral court ruled against the Besings. As stated by U.S. District Judge Felsenthal in his order affirming the Bankruptcy Court, the "state court judgment is entitled to collateral estoppel" as well as a "basic notion of full faith and credit . . . ."

In the alternative, summary judgment for Respondents was appropriate on the merits because §108 of the Code

only grants an extension of the statute of limitations to the representative of the bankruptcy estate, be it a trustee or debtor-in-possession, and not to the post-confirmation reorganized debtor. The authorities cited by Respondents conclusively demonstrates that the "property", the alleged causes of action, belongs to the reorganized debtor and not the bankruptcy estate. Further, all the evidence needed to support this finding was not only uncontroverted, but was judicially admitted by Besing.

For the foregoing reasons, this Honorable Court should deny the Petition for Writ of Certiorari. The Court of Appeals decision was correct and in accordance with the law. No conflict exist with the decision of a state court of last resort. This case does not present any important questions of federal law that should be settled by this Court. Moreover, the issues in this Petition are so clear

cut against the Petitioners that costs should be taxed against the Besings and Respondents should have all other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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July 7, 1992

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that three true and correct copies of the foregoing instrument were forwarded to Petitioners, RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C., by and through the attorney of record, Mr. Jamie Wall, 12222 Merit Drive, Suite 1430, Dallas, Texas 75251; Respondent, THOMAS T. ROGERS, by and through the attorney of record, Thompson and Knight, Mr. Schuyler B. Marshall, 3300 First City Center, 1700 Pacific, Dallas, Texas 75201; and Respondent, LYNCH, CHAPPEL, ALLDAY AND ALSUP, by and through the attorneys of record, Cowles & Thompson, Charles T. Frazier, Jr., 4000 NCNB Plaza, 901 Main Street, Dallas, Texas 75202 via first class mail on July 7, 1992.

Joe A. Byrom